

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-2149

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT SAMPOGNE and STEVEN MALTESE,

Defendants-Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

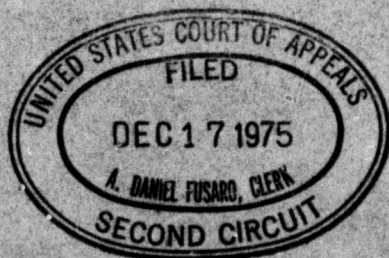
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APPELLANTS BRIEF

AND APPENDIX



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PAGINATION AS IN ORIGINAL COPY

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APPENDIX

1. The decision in question that ROBERT SAMPOGNE was guilty of contempt.
2. The sentence of ROBERT SAMPOGNE to 40 days incarceration and a \$750.00 fine.
 - 2a. Docket Entries
3. Copy of subpoena served on ROBERT SAMPOGNE.
4. Copy of receipt for payment of fine of \$750.00 on behalf of ROBERT SAMPOGNE.
5. Copy of receipt for payment of fine of \$1,000.00 on behalf of STEVEN MALTESE.
6. Record on appeal heretofore filed.

750 1980 U.S.A. vs. SANPOGNE, et alio

DATE	NR.	PROCEEDINGS
11-18-75		Before JUDD, J. - Case called in 75CR-298. Both witnesses present with counsel. Contempt of Court hearing begun. Hearing concluded. Both witnesses found guilty of contempt of Court by failing wilfully to obey a subpoena. Witness Sampogne sentenced to imprisonment for 40 days and fined \$750. Witness remanded. Fine to be paid within six months. Witness Maltese sentenced to imprisonment for 90 days and fined \$1000. Witness remanded. Fine to be paid within six months. Govt to submit order. (1)
11-19-75		By JUDD, J. - Sentence dtd 11-18-75 for contempt filed. (2)
11-19-75		By JUDD, J. - Memorandum dtd 11-19-75 re contempt hearing filed. (3)
11-25-75		Notices of appeal filed. Duplicates mailed to C of A & pliff. (4)
11-26-75		Before JUDD, J. Case called. Counsel present. Defts not present. Bail application pending appeal--granted. Bail set at \$2500 each.
12/8/75		Certified copy of Order read and filed from the C. of A. that the record on appeal is to be filed on or before 12/12/75, etc. (5)
12/10/75		Stenographer's transcript of 11/18/75 filed. (6)
12-10-75		Record on appeal certified and mailed to C of A.

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RJD:HCC:ald
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United States District Court

FOR THE

~~UNITED STATES DISTRICT COURT OF NEW YORK~~

UNITED STATES OF AMERICA

v.

No. 75 CR 298

LARRY ALFANO,

ONLY COPY AVAILABLE

To ROBERT SAMPOGHE

You are hereby commanded to appear in the United States District Court for the Eastern District of New York at 225 Cadman Plaza East in the city of Brooklyn on the 15th day of October 19 75 at 2:00 o'clock P. M. to testify in the above-entitled case.

This subpoena is issued on application of the UNITED STATES OF AMERICA, upon receipt of subpoena. Please contact ROSA ALFANO G. SAMPOGHE, (212) 596-4840. October 7, 19 75.

DAVID G. ROSSER
Attorney for US OF AMERICA
225 Cadman Plaza East
Address Brooklyn, New York 11201

By

[Signature]
Clerk.
Deputy Clerk.

RETURN

Received this subpoena at _____ on _____ I served it on the _____ and on _____ at _____ within named _____ and tendering* to _____ the fee for one day's attendance and the mileage by delivering a copy to _____ and tendering* to _____ the fee for one day's attendance and the mileage allowed by law.

Service Fees

By _____

Travel _____ \$
Services _____
Total _____ \$

* Insert "United States," or "defendant" as the case may be.
* Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

Receipt NO. 019447

DEPARTMENT OF JUSTICE

Office of United States Attorney
ED District of NY

(CHECKS ACCEPTED SUBJECT TO COLLECTION)

Claim Against	US v. Lawrence Alfano Robert Sampoigne (witness)			U. S. Attorney's No.
Amount Received	(\$ 750.00)			751497 75CR298
Agency & File No.				
Type Claim	Amt. of Claim	DJ File No.	<input type="checkbox"/> Pre-judgment <input type="checkbox"/> Judgment <input type="checkbox"/> Compromise	
FINE	\$750.		<input checked="" type="checkbox"/> Paid in full <input type="checkbox"/> Partial Pay No.	
Date Payment Received	11/21/75		By	
			for UNITED STATES ATTORNEY	

ORIGINAL-TO PAYER

Receipt NO. 019444

DEPARTMENT OF JUSTICE

Office of United States Attorney
ED District of NY

(CHECKS ACCEPTED SUBJECT TO COLLECTION)

Claim Against	U.S. v. Lawrence Alfano Steven Maltose (Witness)			U. S. Attorney's No.
Amount Received	(\$ 1000.00)			751497 75CR298
Agency & File No.				
Type Claim	Amt. of Claim	DJ File No.	<input type="checkbox"/> Pre-judgment <input type="checkbox"/> Judgment <input type="checkbox"/> Compromise	
FINE	\$1000.		<input checked="" type="checkbox"/> Paid in full <input type="checkbox"/> Partial Pay No.	
Date Payment Received	11/21/75		By	ams
			for UNITED STATES ATTORNEY	

ORIGINAL-TO PAYER

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TABLE OF CASES CITED

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Barker v. United States 153F(2d) 66 163 ALR 397 rev'g 59F Supp. 153	11
Board of Education of Ind. School Dist. 89, Okla. County v. York, 429F(2d) 66	13
Bradley 318 US50 63 SCR 470	12, 13
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Davis (ex parte) 112 Fed. 139	12
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. United States 257F(2d) 610	12
May Hosiery Mills Inc. v. United States District Court 64F(2d) 450	10
Osborne (in the matter of) 344F(2d) 611	12
Timmons v. United States 158F(2d) 370	12
United States v. Carol 147 Fed. 947	10
United States ex rel D & O Y Co. v. Atcheson, T & S. F.R.Y. Co. 16 Fed. 853	13
United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers 328F Supp. 1359	13
United States v. Jose 63 Fed. 951	10
United States v. Seale 461F(2d) 345	10
Wilson v. United States 26F(2d) 245	12

TABLE OF STATUTES

Federal Rules of Criminal Procedure Rule 17(g).

"Contempt.-Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.....".

18 U.S.C.S. Section 401.

"Power of Court.-A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority.....".

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
-----X

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT SAMPOGNE and STEVEN MALTESE,
Defendants-Appellants
-----X

STATEMENT

This is an appeal from an Order, dated November 18, 1975, rendered by the Hon. Orrin G. Judd in the United States District Court, Eastern District of New York, finding the defendant-appellant, ROBERT SAMPOGNE, guilty of contempt of Court for violation of the Federal Rules of Criminal Procedure, Rule 17(g) and from each and every part and the whole of said Order including the sentence imposed. A subpoena, on behalf of the UNITED STATES OF AMERICA, was served on ROBERT SAMPOGNE, which subpoena required his appearance at the United States District Court, Eastern District of New York, on Wednesday, October 15, 1975 at 2 o'clock P.M. (Government's Exhibit 1 for identification, page 6 trial minutes, in evidence page 19 trial minutes).

It is uncontroverted that ROBERT SAMPOGNE appeared, pursuant to said subpoena, at the courtroom at the trial, for which he had been subpoenaed, on October 15, 1975. No one in behalf of the Government gave any directions to ROBERT SAMPOGNE for him to return on any future date (trial minutes pages 6, 7), nor did the subpoena served on Mr. Sampogne

itself have any directions about returning at any other date. (Trial minutes page 10). It was only at the end of the trial day that the Assistant U.S. Attorney sought to find Mr. Sampogne, at a time when the participants were in the process of leaving the courtroom. However, the Assistant U.S. Attorney did not find Mr. Sampogne, and gave him no directions (Trial minutes page 11).

The Federal Bureau of Investigation agent who served the subpoena on ROBERT SAMPOGNE saw him present in the Courtroom on October 15, 1975 (Trial minutes page 32 and page 33).

On October 16, 1975, ROBERT SAMPOGNE did not return to the courtroom. Some time during that day, the F.B.I. agent who initially served Mr. Sampogne telephoned Mr. Sampogne's residence, a two family house in which both the defendant, Mr. Robert Sampogne and his wife live and also Mr. Sampogne's parents. The agent testified he spoke to a Mrs. Sampogne but did not know whether said lady was the wife or mother of the defendant, ROBERT SAMPOGNE, and left a message with whomever he spoke to that Mr. Sampogne appear at Court on October 17, 1975. Mr. Sampogne did not appear on such date. No evidence was adduced that Mr. Sampogne, in fact, received the message (Trial minutes pages 77 through 79).

ROBERT SAMPOGNE was sentenced to 40 days imprisonment and a fine of \$750.00. The fine of \$750.00 was paid in full on November 21, 1975 and receipt number 019447 from the Department of Justice was issued therefor.

Appellant, ROBERT SAMPOGNE, is a liberty, on bond, pending appeal to this Court.

QUESTIONS PRESENTED

1. Was there sufficient evidence before the Court to support a contempt conviction as to Appellant, ROBERT SAMPOGNE?
2. Did the Court exceed its power in imposing a sentence of incarceration plus a fine?
3. The fine having been paid: is the sentence satisfied?

POINT I

The evidence before the Court was insufficient to support a contempt conviction of ROBERT SAMPOGNE.

For an accusation of contempt to be sustained there must be a showing of a criminal intent. U.S. v. Jose, 63 Fed. 951. The failure of SAMPOGNE to come back to court under the circumstances prevailing was not a wrongful or unlawful act per se, such that the commission of a contempt was determined by the act itself. In this case, intent had to be proven and was crucial. May Hosiery Mills, Inc. v. U.S. District Court, 64F(2d) 450. The accusation of contempt had to be supported by evidence sufficient to convince the trier, beyond a reasonable doubt, of the actual guilt of SAMPOGNE and every element of the offense, including a criminal intent, had to be proved by evidence or circumstances warranting an inference of the necessary facts. U.S. v. Jose, 63 Fed. 951; U.S. v. Carol, 147 Fed. 947. Further, the court in its memorandum, made to amplify the Court's reason for the sentence imposed on SAMPOGNE, and the other witness, considered irrelevant matters in determining the guilt of SAMPOGNE. The Court should consider in a contempt proceeding, four elements to support a conviction, these elements being: (1) Misbehavior, (2) such misbehavior must rise to the level of an obstruction of the administration of justice, (3) the conduct of the witness in question must be in the Court's presence or so near it as to obstruct the Court's functions, and (4) there must be an intent to obstruct the Court's function. U.S. v. Seale, 461F (2d) 345. Did SAMPOGNE misbehave? He

appeared on the 15th and was not directed to return thereafter. Was his failure to inquire whether he had to return such behavior as to constitute an obstruction of the administration of Justice and was it such an act as to demonstrate an intent to obstruct the administration of Justice? Did the government prove a charge of contempt against SAMPOGNE? If SAMPOGNE was answering a charge of contempt, he was presumed to be innocent and had to be proved guilty beyond a reasonable doubt and could not be compelled to testify against himself. Barker v. U.S. 153F(2d) 66, 163 ALR 397, rev'g 59F Supp. 153.

POINT II

The Court exceeded its power in imposing a sentence of incarceration plus a fine.

The power of the United States District Court to punish for any contempt is governed by 18 U.S.C. Section 401. Said section, entitled "Power of Court" provides, "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority****"

The Court's power to punish for contempt is thus limited to imprisonment or to fine, but it cannot do both. In re Bradley, 318 US 50, 63 SCR 470; ex parte Davis, 112 Fed. 139; Wilson v. U.S. 26F(2d) 215; Clark v. U.S. 61F(2d) 695, aff'g. 1F supp 747, aff'd 289 US1, 77Ld. 993, 53 SCR 465; Carter v. U.S. 135F(2d) 858; Timmons v. U.S. 153F(2d) 370; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. U.S. 257F(2d) 610; In the Matter of Osborne, 344F(2d) 611.

POINT III

SAMPOGNE having paid the fine
satisfied the sentence.

Punishment had to be by fine or imprisonment and the power of the Court was so limited. Upon payment of the fine, the sentence was satisfied and no subsequent amendment of the sentence could be made which would vacate such satisfaction. In re Bradley, 318 US 50, 63 SCR 470; U.S. ex rel, D & O Y Co. v. Atcheson, T & S.F.R.Y. Co. 16 Fed. 853. The court could not punish SAMPOGNE's contempt by fine and imprisonment, both being improper. Board of Education of Ind. School Dist. 89, Okla. County v. York, 429F(2d) 66; United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousement and Helpers, 328F Supp. 1359.

CONCLUSION

There was insufficient evidence to overcome the presumption of innocence, insufficient evidence to prove SAMPOGNE guilty of contempt beyond a reasonable doubt, and the judgment of conviction should be reversed and the charge dismissed with prejudice.

The Court exceeded its power in imposing a sentence of incarceration plus a fine, and the fine having been paid, the sentence is satisfied.

Respectfully submitted,

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U. S. ATTORNEY

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P. Chapman